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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

YAVAPAI-PRESCOTT INDIAN TRIBE

Petitioner,

v.

JAMES G. WATT, et al.
and MARLIN D. KUYKENDALL

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

I. Is an administrative decision by the United States Interior Board of Indian Appeals, interpreting a lease between an Indian tribe and a nonmember lessee as requiring resort to a procedure set forth in federal regulations for its cancellation, arbitrary, capricious, an abuse of discretion, or otherwise contrary to law?

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the statutes cited in the Petition at 2-3, consideration of the following constitutional provision and statutes is necessary:

1. United States Constitution, article IV, section 3, clause 2 ("Property Clause"):

> Congress shall have the Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.

2. Act of June 7, 1935, Ch. 202, 49 Stat. 332, provides in relevant part as follows:

> Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That jurisdiction over that tract of land, identified under a metes-and-bounds description . . . containing approximately seventy-five acres, is hereby transferred from the Veterans' Administration to the Depart-

ment of the Interior, and the title to said described lands shall remain in the United States in trust for the Yavapai Indians.

3. Act of May 18, 1956, Ch. 279, 70 Stat. 157, provides in relevant part as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That jurisdiction over one thousand three hundred and twenty acres of land, more or less, formerly a part of the Fort Whipple Military Reservation, Arizona, and subsequently transferred to the Veterans' Administration by section 6 of the Act of March 4, 1931 (16 Stat. 1550), is hereby transferred to the Secretary of the Interior, and the title to such lands shall be held by the United States in trust for the Yavapai Indians, subject to any valid and existing rights in such lands. . . .

4. United States Code, Title 25, Section 177 provides in relevant part as follows:

No purchase, grant, lease, or other conveyance of lands,

or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution. . . .

STATEMENT OF THE CASE

The present controversy arises out of a ground lease between Marlin D. Kuykendall ("Kuykendall"), as lessee, and the Yavapai-Prescott Community Association (the "Yavapai-Prescotts"),[1] as lessor, approved in 1969 by the Phoenix Area Director of the Bureau of Indian Affairs. The lease involves slightly greater than four acres of bare ground located within the approximately 1,395 acres of land held by the Secretary of the Interior in an express trust for the

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[1] The Yavapai Prescott Community Association was formed in 1962, by a group of Yavapai Indians who adopted articles and bylaws which were approved by the Commissioner of Indian Affairs on December 5, 1962. A 1975 amendment changed the name of the association to the Yavapai-Prescott Tribe. The United States has never entered a treaty with this association or tribe. The Yavapai-Prescotts have never organized pursuant to the provisions of the Indian Reorganization Act, Ch. 576, 48 Stat. 984 (1934).

benefit of the Yavapai Indians.[2] The ground lease was entered into pursuant to the provisions of 25 U.S.C. § 415 and the regulations thereunder found at 25 C.F.R. Part 162.[3]

The history of the dispute between Kuykendall and the Yavapai-Prescotts is set forth in the decision of the United States Interior Board of In-

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[2] Congress transferred 75 acres to the Secretary of the Interior in trust for the Yavapai Indians by an Act of June 7, 1935, Ch. 202, 49 Stat. 332. An additional 1320 acres were transferred by Congress to the Secretary of the Interior in trust for the Yavapai Indians by an Act of May 18, 1956, Ch. 279, 70 Stat. 157.

[3] These regulations were previously designated 25 C.F.R. §§ 131.1 et seq. The first paragraph of the lease specifically incorporates the regulations at 25 C.F.R. Part 162, reciting that the lease is entered into under 25 U.S.C. § 415 "as implemented by Part 131 [now 162], Leasing and Permitting, of the Code of Federal Regulations, Title 25 -- Indians, and any amendments thereto which by reference are made a part hereof." App. A-1 hereto.

dian Appeals (the "Board"). Kuykendall v. Phoenix Area Director, 8 IBIA 76 (1980); Petition App. C.

The Yavapai-Prescotts sought judicial review of the Board's decision under the Administrative Procedure Act, 5 U.S.C. § 701 et seq., and the District Court reversed the Board's decision. Yavapai-Prescott Indian Tribe v. Watt, 528 F. Supp. 695 (D.Ariz. 1981); Petition App. B. Kuykendall appealed, and the Ninth Circuit reinstated the Board's decision. Yavapai-Prescott Indian Tribe v. Watt, 707 F.2d 1072 (9th Cir. 1983); Petition App. A.

SUMMARY OF ARGUMENT

I. Both the agency and the Ninth Circuit interpreted the lease itself as requiring the Secretary of the Interior to be involved in any cancellation thereof.

II. There has been no demonstration by the Petitioner either in the proceedings below or before this Court that the agency's and the Ninth Circuit's interpretation of the lease is arbitrary, capricious, an abuse of discretion, or otherwise contrary to law.

III. The agency's and the Ninth Circuit's interpretation of the lease is (a) compelled by the Constitution, (b) compelled by the trust responsibility of the United States, (c) not contrary to any congressional policy relative to tribal self-government,

and (d) in accord with the decisions of this Court.

IV. The Petition presents no questions of federal law with public policy implications warranting review by this Court; nor does the case present a conflict between circuit courts or with any decision of this Court and review is not warranted.

REASONS FOR DENYING WRIT

I

THE NINTH CIRCUIT'S DECISION IMPACTS SOLELY ON THE LEASE RELATIONSHIP BETWEEN PETITIONER AND RESPONDENT AND PRESENTS NO QUESTIONS OF FEDERAL LAW WITH PUBLIC POLICY IMPLICATIONS FOR LESSEES OF INDIAN LANDS OR INDIAN TRIBES GENERALLY.

The Petition seeks the reversal of a decision of the United States Court of Appeals for the Ninth Circuit upholding a decision of the Board. Recognition of the issues presented to this Court thus requires a clear understanding of the issues before the Board and the precise nature of the Board's decision.

The Board was presented with a lease dispute between Kuykendall and the Yavapai-Prescotts. The Board decided that Section 30 of the lease in question did not authorize unilateral tribal cancellation but, rather, required resort to

the lease termination procedure set forth in 25 C.F.R. § 162.14. The critical decision reached by the Board was, therefore, an interpretation of the terms of the lease. Once the Board reached its decision regarding the proper interpretation of the lease, its remaining discussion of the ability of the Secretary of the Interior to confer a unilateral power of lease termination upon an Indian tribe if he chose to do so (the Board having concluded that he did not purport to do so) is pure dicta, albeit correct dicta.

The Yavapai-Prescotts seek to elevate what is essentially a lease dispute between a single landlord and a single tenant into a policy issue affecting all Indian tribes and all occupiers of reservation lands, and they do so by repeatedly misstating the terms of the lease. First, on three occasions the Petition erroneously asserts that Section

30 of the lease permits "either the tribe or the Secretary" to terminate the lease, and adds emphasis by italicizing "either" and "or." Petition at 4 n.1, 12 & 17. Second, the Petition erroneously asserts, without argument, that the lease termination procedure in Section 30 of the lease is contrary to the lease termination procedure set forth in 25 C.F.R. § 162.14. Petition at 3-4. But repetition of erroneous facts and erroneous conclusions, even if accompanied by emphasis, cannot change the fact that Section 30 of the lease does not state that "either the tribe or the Secretary" may terminate the lease (see below) or the fact that both the Board and the Ninth Circuit construed the lease as consistent with 25 C.F.R. § 162.14, thereby giving effect to the lease provision specifically incorporating by reference the regulations in 25 C.F.R. Part 162. Each and every asser-

tion in the Petition that the Yavapai-Prescotts have been denied the right to terminate the lease "in accordance with its terms" (Petition at 6, 10, 13 & 16) is based upon the completely unwarranted assumption that the lease conferred such a right upon them.[4/]

Section 30 of the lease provides for written notice of breach and an opportunity to cure and, if the breach is not cured within the applicable period, "then Lessor and/or the Secretary may either" (a) collect rent or enforce compliance by suit or otherwise; or (b) re-enter and either re-let or terminate the lease; or (c) take any other action

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4/ The Board recognized that the Yavapai-Prescotts made this same assumption in proceedings before the Board. 8 IBIA 76, 85 n.11; Petition App. C at 8-9.

to protect the interest of the Lessor.[5/] The phrase "Lessor and/or the Secretary" in Section 30 contemplates that certain of the enumerated actions in that section require joint conduct of the Secretary "and" the Lessor and certain other actions may be taken by the Secretary "or" the Lessor.[6/] The Board, after a

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5/ Section 30 of the lease is quoted in its entirety in the decision of the Board. 8 IBIA 76, 83 n.11; Petition App. C at 7.

6/ For example, there can be no dispute that the Secretary "or" the Lessor could, under Section 30(A) of the lease, "collect by suit or otherwise all monies as they become due" under the lease "or enforce by suit" compliance with the lease. See Poafpybitty v. Skelly Oil Co., 390 U.S. 365 (1968). By the same token, there can be no dispute that Section 30 contemplates joint action of the Secretary "and" the Lessor to re-let the premises since the statute (25 U.S.C. § 415) and the regulations (25 C.F.R., Part 162) require joint action of the Lessor "and" the Secretary to lease this land. The phrase is entirely consistent with the regulations if the word "and" applies to

(Footnote continued on following page)

thorough analysis of the terms of the lease and the trust responsibility of the Secretary of the Interior, construed the "and/or" phrase, insofar as applicable to the remedy of termination, as requiring resort to the lease termination procedure set forth in 25 C.F.R. § 162.14. 8 IBIA 76, 82-86; Petition App. C at 5-10. The Ninth Circuit agreed: "The Secretary did not read this clause as the Tribe suggests, nor do we." 707 F.2d at 1076.

The Petition asserts that the decisions of the Board and the Ninth Cir-

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6/ (Continued from previous page)

the optional remedies described in Section 30(B)(1) and Section 30(B)(2) and the word "or" applies to the optional remedies described in Section 30(A) and Section 30(C). This construction is fully supported by the last sentence of Section 30(C), which uses the conjunctive "the Lessor and the Secretary" in referring to the optional remedies described in both Section 30(B)(1) and Section 30(B)(2).

cuit are contrary to this Court's decision in Poafpybitty v. Skelly Oil Co., supra. In Poafpybitty, the Court discussed the ability of individual Indians holding allotted land to maintain a damage action for breach of express and implied covenants contained in a lease between those Indians and a lessee, approved by the Department of the Interior. The Court held that the regulations promulgated by the Secretary of the Interior to govern oil and gas leases, while an exercise of supervisory authority in considerable detail, did not prevent the Indians from seeking damages for an alleged violation of the lease where "there is nothing in the lease or regulations requiring the Indians to seek administrative action . . . instead of instituting legal proceedings on their own." Id. at 373 (emphasis added). Most importantly, however, the Court acknowl-

edged the existence of a federal regulation controlling the cancellation of an oil and gas lease and, by clear implication, excised from the judicial relief that could be sought by the Indians an action for cancellation of the lease.

> The regulations do empower the Secretary to cancel a lease "for good cause upon application of the lessor or lessee, or if at any time the Secretary is satisfied that the provisions of the lease or of any regulations heretofore or hereafter prescribed have been violated." 25 C.F.R. § 172.23 (1967). However, there is no justification for concluding that the severe sanction of cancellation of the lease is the only relief for all breaches of the lease terms or for any failure to pay royalties. Both the lessor and the lessee may wish to resolve their disagreement by the payment of damages and not by the cancellation of a basically satisfactory lease.

Id. at 374. Acknowledging that the Yavapai-Prescotts could, under Section 30(A) of the lease, either "collect by suit or otherwise all monies as they be-

come due" or "enforce by suit" Kuykendall's compliance with the lease is a far cry from acknowledging the right of the Yavapai-Prescotts to exercise a unilateral power to cancel the lease without resort to 25 C.F.R. § 162.14, particularly where the lease specifically incorporates by reference the regulations in 25 C.F.R. Part 162. Unlike Poafpybitty, in this case both the lease and the regulations require the Yavapai-Prescotts to seek administrative action to cancel the lease. The Poafpybitty decision is fully consistent with the decisions of the Board and the Ninth Circuit.

II

THE NINTH CIRCUIT'S DECISION IS IN ACCORD WITH THE STANDARD OF REVIEW OF AGENCY ACTION UNDER THE ADMINISTRATIVE PROCEDURE ACT.

The action in the court below was commenced under the Administrative Procedure Act, 5 U.S.C. § 701 et seq. The standard of judicial review of agency action under the Administrative Procedure Act is set forth in 5 U.S.C. § 706, which provides that a reviewing court shall hold unlawful and set aside agency action only if the action was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, or if the action failed to meet constitutional, statutory or procedural requirements. 5 U.S.C. § 706(2)(A), (B), (C), (D); see Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971).

The point of difference between the Yavapai-Prescotts and the Board is simply stated: Whereas the Board determined that Section 30 of the lease did not confer a power of unilateral termination on the Yavapai-Prescotts and that 25 C.F.R. § 162.14 set forth the exclusive means by which the lease could be cancelled, the Yavapai-Prescotts assert that Section 30 of the lease did confer such a power and that this same regulation does not purport to specify an exclusive method for cancelling the lease. But the Yavapai-Prescotts do not demonstrate, nor could they, that the Board's administrative interpretation of the lease or the regulation was, as required by 5 U.S.C. § 706, arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, or contrary to constitutional, statutory or procedural requirements. The Yavapai-Prescotts would have

the federal courts simply substitute their interpretation of the lease and the regulation for the judgment of the federal agency specifically authorized by statute to supervise the leasing of tribal lands. The Ninth Circuit properly declined to do so, and cogently articulated the reasons supporting judicial deference to the Board's administrative interpretation of the lease and the regulation.

The reversal of the Board's decision would violate every rule developed to guide a reviewing court's approach to supervising agency action. In Udall v. Tallman, 380 U.S. 1, 16 (1965), this Court stated:

> When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by officers or agency charged with its administration. . . . When the construction of an administrative regulation rather than a statute is in is-

> sue, deference is even more clearly in order. (Emphasis added.)

In Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 413-14 (1945), this Court stated:

> Since this involves an interpretation of an administrative regulation a court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt. . . . [T]he ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation. (Emphasis added.)

The views of the Department of the Interior on Indian affairs is of particular significance to this Court. See United States v. Wheeler, 435 U.S. 313, 328 n.27 (1978).

In addition to these general rules of judicial deference to administrative interpretation of statutes and regulations, courts give extra authoritative

weight to administrative interpretations which are made contemporaneously with the enactment of a statute, which have been followed over a long period,[7] or which have been outstanding at the time of legislative reconsideration of a statute. See Saxbe v. Bustos, 419 U. S. 65, 74 (1974); N.L.R.B. v. Boeing Co., 412 U.S. 67, 74-75 (1973); Davis, Administrative Law Treatise, § 7:14 (1978).

The regulation now found at 25 C.F.R. § 162.14 has been in existence since the enactment of 25 U.S.C. § 415 in 1955.[8] In fact, this regulation has its

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[7] The Board found nothing "novel" in its conclusion. 8 IBIA at 88 n.20; Petition App. C at 11. The Board also found the prior conduct of the parties consistent with its conclusion. 8 IBIA at 86 n. 15; Petition App. C at 10.

[8] Comparable cancellation regulations exist with respect to leases, permits and rights-of-way granted under other federal

(footnote continued on next page)

origin in the first generally-applicable leasing regulations relating to Indian lands promulgated by the Department of the Interior in 1929.[9] Then, leases of restricted Indian lands were permitted under different statutory authority for much shorter periods of time than permitted by 25 U.S.C. § 415; however, the

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[8] (continued from previous page)

statutes pertaining to Indian lands. See e.g., 25 C.F.R. §§ 166.15, 168.10, 169.20, 211.27, 212.23, 213.40, 214.25, 216.10.

[9] Section 16 of the 1929 regulations read as follows: "The superintendent should make every effort to see that lessees and permittees comply with the regulations and the terms of their contracts. Should violations thereof occur, the superintendent should serve written notice on the lessee to show cause why the lease should not be canceled. Upon receipt of the answer it should be transmitted to the Commissioner of Indian Affairs with a full report of the facts and the superintendent's recommendations."

regulations still mandated secretarial involvement in terminations.[10/]

Since 1955, Congress has reconsidered and amended 25 U.S.C. § 415 no less than 16 times. Despite the continuing existence of a regulation requiring secretarial involvement in lease terminations, dating back to 1929, Congress has failed to change the basic law to permit the Indian owners to unilaterally terminate leases without secretarial in-

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10/ In 1978, an amendment was proposed to 25 C.F.R. § 162.14 stating: "If the lease provides different remedies for default by a lessee, the provisions of the lease shall govern." 43 Fed. Reg. 50217, October 27, 1978. The proposed amendment is not yet effective. The decisions of the Board and the Ninth Circuit correctly noted that an agency is bound by its own regulations until amended and that all parties are bound by regulations currently in force. Vitarelli v. Seaton, 359 U.S. 535, 539 (1959).

volvement.[11] The failure by Congress to change the law in the face of this consistent administrative interpretation, after many opportunities to do so, demonstrates that Congress intended that the statute be interpreted as the regulation now provides. Saxbe v. Bustos, supra; N.L.R.B. v. Boeing Co., supra.

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[11] That Congress was aware of its ability to confer a unilateral power of termination upon an Indian is clear from the Act of May 26, 1926, Ch. 403, 44 Stat. 658, as amended by the Act of March 15, 1948, Ch. 120, 62 Stat. 80, which permitted Crow Indians classified as competent to lease trust lands without secretarial approval. The implementing regulation, 25 C.F.R. § 162.15(e), specifies that a competent Crow Indian shall have full responsibility for obtaining compliance with the terms of a lease not approved by the Secretary. See Chambers & Monroe, Regulating Sovereignty: Secretarial Discretion and the Leasing of Indian Lands, 26 Stan.L.Rev. 1061, 1075-76 (1974).

III

THE BOARD'S DECISION IS COMPELLED BY THE UNITED STATES CONSTITUTION AND THE TRUST RESPONSIBILITY OF THE UNITED STATES OVER LANDS HELD IN TRUST FOR THE YAVAPAI-PRESCOTTS.

A. The Board's administrative interpretation of the lease and 25 C.F.R. § 162.14 is compelled by the United States Constitution.

The lease in question covers land that has been federal land since the date of its acquisition from the Republic of Mexico by virtue of the Treaty of Guadalupe Hidalgo in 1848. 9 Stat. 922. Article XI of that treaty recognized that the ceded territory was then occupied by various Indian tribes "who will hereafter be under the exclusive control of the government of the United States."

The control of the public domain and other property belonging to the United States is vested exclusively in

Congress by article IV, section 3, clause 2, of the United States Constitution, the so-called "Property Clause," which states: "Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." By virtue of the Property Clause, the United States is the only sovereign with power over lands owned by the United States --to the exclusion of all others.

> The power of Congress over the Territories of the United States is general and plenary, arising from and incidental to the right to acquire the territory itself, and from the power given by the Constitution to make all needful rules and regulations respecting the territory or other property belonging to the United States. . . . Having rightfully acquired said territories, the United States government was the only one which could impose laws upon them, and its sovereignty over them was complete. No State of the Union had any such right of sovereignty over them; no other country or government has any such right.

Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1, 42-43 (1890). The authority vested in Congress by the Property Clause "implies an exclusion of all other authority over the property which could interfere with this right or obstruct its exercise." Wisconsin Central Railroad Co. v. Price County, 133 U.S. 496, 504 (1890).[12/]

Indian reservations are "a part of the territory of the United States," and Indian tribes hold and occupy tribal lands "with the assent of the United States, and under their authority." United States v. Rogers, 45 U.S. (4 How.)

12/ That Indian tribes were within the contemplation of the Court in the Latter-Day Saints and Wisconsin Central decisions is clear from its decision four years earlier in United States v. Kagama, 118 U.S. 375 (1886), in which the Court held that all governmental power in the United States exists in subordination to one of two sovereigns--the United States and the States of the Union.

567, 571-72 (1846). Whatever might be the scope of the sovereign powers of Indian tribes, their powers over federal lands are clearly among those of which they have been explicitly divested by the self-executing effect of the Property Clause. See United States v. Wheeler, supra at 326; Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 208-09 (1978). In this area, Indian tribes have only such powers as may be specifically recognized in them by Congress. In the absence of statutory authorization, Indian tribes would be absolutely prohibited from leasing tribal lands. 25 U.S.C. § 177.

Title 25 U.S.C. § 415 is an exercise by Congress of its power over federal lands, authorizing the leasing of restricted Indian lands for business purposes only with the approval of the Secretary of the Interior and providing that such leases "shall be made under

such terms and regulations as may be prescribed by the Secretary of the Interior." The Secretary has promulgated regulations governing the leasing of restricted Indian lands, including Part 162, Title 25, Code of Federal Regulations. This scheme, with its source in the Constitution, is the entire body of law affecting business leases of Indian lands.

The Petition asserts the existence of a power of the Yavapai-Prescotts to cancel a business lease validly entered into pursuant to 25 U.S.C. § 415 without pointing to any constitutional, statutory or regulatory authority in support of this non-federal power over lands owned by the United States. This assertion is directly contrary to the constitutional requirement that only "Congress shall have power to dispose of and make all needful Rules and Regulations respec-

ting the Territory or other Property belonging to the United States." U.S. Const. art. IV, §3, cl. 2; See Wisconsin Central Railroad Co. v. Price County, supra.

B. The Board's administrative interpretation of the lease and 25 C.F.R. § 162.14 is compelled by the trust responsibility conferred upon the Secretary of the Interior relative to Indian lands.

The Yavapai-Prescott Community Reservation was created by statutes transferring land to the Secretary of the Interior with the express provision "that the title to such lands shall be held by the United States in trust for the Yavapai Indians." See n. 2 supra. No subsequent act of Congress has terminated this express trust. Once Congress has established a trust responsibility with an Indian tribe, Congress alone has the right to determine when this responsibility shall cease, and this right must be

exercised in plain and unambiguous language. See Joint Tribal Council of Passamaquoddy Tribe v. Morton, 528 F.2d 370 (1st Cir. 1975), and cases cited therein.

Perhaps the clearest statement regarding the existence and scope of the trust responsibilities of the United States with respect to the Yavapai-Prescotts is set forth in Section 34 of the lease with Kuykendall, which discusses the possibility of a termination of federal trust responsibilities over the leased land during the term of the lease:[13] "In the event of such termination, all powers, duties, or other functions of the Secretary of the Interior or his authorized representative shall terminate, and the responsibility for enforcing compliance with the covenants of

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[13] Section 34 of the lease is set forth in full in Appendix A-3 hereto.

this lease shall be assumed by the Lessor, Lessor's heirs, devisees, executors, administrators, or assigns." The second paragraph of Section 34 of the lease recognizes that a termination of the trust responsibility would be accompanied by the relinquishment of supervision of the lease, and further provides that any such relinquishment cannot be binding upon Kuykendall without appropriate notice stating the extent of such relinquishment. The basic outline is clearly marked: Where the trust responsibility of the United States exists and secretarial approval of leases of trust lands is required, the Secretary retains supervisory responsibility over the lease; where no trust responsibility exists, supervisory responsibility over the lease passes to ("shall be assumed by") the lessor. This is the outline followed with respect to the Five Civilized Tribes

(25 C.F.R. § 213.42) and the Crow Tribe. See n.11, supra, and 25 C.F.R. § 162.15(e).

Section 29 of the lease provides an additional benchmark with respect to the existence and scope of the federal trust responsibility with respect to the Yavapai-Prescotts.[14] This provision, which provides for arbitration when the parties to the lease are unable to reach an agreement,[15] further provides that the decision of the arbitration board is binding on the parties, but subject to the approval of the Secretary of the Interior. Section 29 goes on to make clear that, while the "Secretary may be expected to accept any reasonable decisions" reached by the arbitration board, the Secretary "cannot be legally bound by

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[14] Section 29 of the lease is set forth in full in Appendix A-2 hereto.

[15] Arbitration was invoked by Kuykendall. The Yavapai-Prescotts denied the applicability of the arbitration provision.

any decision which might be in conflict with the interests of the Indians or the United States Government."

The Board recognized that the lease interpretation urged by the Yavapai-Prescotts was bottomed on the proposition that Section 30 of the lease constituted a delegation of secretarial authority to cancel leases and found: "It is difficult, in view of the general tenor of the lease document, to accept their [the Yavapai-Prescotts'] assumption that the use of the words 'and/or' in Clause 30 constituted a delegation of secretarial authority to administer leased trust property contrary to Departmental regulations." 8 IBIA 76, 85-86; Petition App. C at 8-9. The Board then set forth in detail this "general tenor" of the lease, demonstrating the Secretary's continuing supervisory responsibilities over these

trust lands. 8 IBIA 76, 85 n.12; Petition App. C at 9.

In the face of such overwhelming evidence of the Secretary's continued involvement in the affairs of this lease, the Yavapai-Prescotts' contention that the lease, by its terms, constituted a decision by the Secretary to absent himself from deciding whether termination was appropriate is preposterous. Even if the Secretary sought to so absent himself, he is without authority to do so. The trust responsibility may only be terminated by Congress, not by administrative action. See Jicarilla Apache Tribe v. Supron Energy Corp., 479 F.Supp. 536, 553 (D.N.M. 1979).

C. The Board's administrative interpretation of the lease and 25 C.F.R. § 162.14 is not contrary to congressional policies relative to tribal self-government.

This Court has recognized three statutes -- the Indian Reorganization Act

of 1934, Ch. 576, 48 Stat. 984, 25 U.S.C § 461 et seq., the Indian Financing Act of 1974, 88 Stat. 77, Pub.L.No. 93-262, 25 U.S.C. § 1451 et seq., and the Indian Self-Determination and Education Assistance Act of 1975, Pub.L.No. 93-638, 88 Stat. 2203, 25 U.S.C. § 450 et seq. -- as evidencing "to varying degrees a congressional concern with fostering tribal self-government and economic development." Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 155 (1980). None of these statutes, however, evidence a relinquishment in favor of Indian tribes of any portion of Congress' authority to make needful rules and regulations respecting property belonging to the United States. "When Congress intends to delegate power to turn over lands to the Indian permanently, one would expect to and doubtless would find definite indi-

cations of such a purpose." Hynes v. Grimes Packing Co., 337 U.S. 86, 104 (1949). Nor do these statutes evidence a congressional intent to diminish the trust responsibilities of the United States. To the contrary, both the Indian Self-Determination and Education Assistance Act of 1975 and the Indian Reorganization Act of 1934 specifically reaffirm the unaltered continuation of the trust responsibilities of the United States. 25 U.S.C. §§ 450n, 462.

D. The Board's administrative interpretation of the lease and of 25 C.F.R. § 162.14 is not contrary to this Court's pronouncements relative to tribal self-government.

This Court has affirmed the power of Indian tribes to punish tribal members, to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members. Montana v. United States, 450 U.S. 544, 564 (1981). "But

exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation." Ibid. As a general proposition, "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." Id. at 565.

Although this Court has recognized the exercise of tribal civil authority over the activities of nonmembers, in each instance tribal authority was either consensual by the nonmember, see Williams v. Lee, 358 U.S. 217 (1959) (a non-Indian plaintiff could maintain a suit in tribal court against an Indian defendant), or exercisable only with the approval of the Secretary of the Interior. See Washington v. Confederated

Tribes of Colville Indian Reservation, supra at 144 ("These ordinances have been approved by the Secretary of the Interior . . ."); Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 136 (1982) ("The ordinance was approved by the Secretary . . ."). This Court in Merrion specifically acknowledged secretarial approval as a constraint on tribal civil authority over nonmembers: "Of course, the Tribe's authority to tax nonmembers is subject to constraints not imposed on other governmental entities . . . the Tribe must obtain the approval of the Secretary before any tax on nonmembers can take effect." Id. at 141.[16/]

16/ Two early federal decisions are often cited in support of tribal civil authority over nonmembers. Morris v. Hitchcock, 194 U.S. 384 (1904); Buster v. Wright, 135 F. 947 (8th Cir. 1905). The tribal enactment in each of these

(Footnote continued on next page)

In the present case, the Yavapai-Prescotts seek to assert civil authority over Kuykendall without the approval of the Secretary of the Interior and, indeed, in the face of a specific finding by the Board that the Secretary never intended to confer such authority on the Yavapai-Prescotts. The decisions of this Court do not countenance the existence of such unfettered tribal powers over non-members.

16/ (Footnote continued from previous page)

decisions was not based solely upon the "sovereign powers" of an Indian tribe but, rather, was authorized by the Curtis Act of June 28, 1898, Ch. 517, 30 Stat. 495. The Curtis Act specifically provided that tribal enactments were not effective until approved by the President of the United States, and enforcement was by federal officials (not tribal officials) pursuant to regulations promulgated by the Secretary of the Interior. "This law of the Creek Nation was in legal effect a law of the United States, because it was authorized by treaties, acts of Congress, and judicial decisions of this nation [the United States]." Buster v. Wright, supra at 956.

CONCLUSION

The decision of the Ninth Circuit upholding the Board's decision does not present any broad policy issues warranting this Court's grant of a writ of certiorari.

No conflict between the circuit courts or with any decision of this Court is presented. The decision of the Board interpreting the lease, as upheld by the Ninth Circuit, does not present any special or important issues warranting this Court's discretionary review. The Petition should be denied.

RESPECTFULLY SUBMITTED this 30th day of September, 1983.

SNELL & WILMER

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APPENDIX A-1

THIS CONTRACT is made and entered into this 11th day of September, 1969, by and between The Yavapai-Prescott Community Association hereinafter called the Lessor, whose address is P. O. Box 1390, Prescott, Arizona, and Marlin D. Kuykendall, hereinafter called the Lessee, whose address is P. O. Box 911, Prescott, Arizona, under the provisions of the Act of August 9, 1955 (69 Stat. 539) as implemented by Part 131, Leasing and Permitting, of the Code of Federal Regulations, Title 25 - Indians, and any amendments thereto which by reference are made a part hereof.

APPENDIX A-2

29. ARBITRATION

Whenever during the term of this lease the Lessee and the Lessor are unable to reach an agreement as required by this lease, and it becomes necessary to submit a matter to arbitration for settlement, an Arbitration Board shall be established. Said Arbitration Board shall consist of three persons, one member to be selected by the Lessee, one member to be selected by the Lessor, and the third to be selected by the other two members. The decision of the majority of the members of the Arbitration Board so constituted shall be binding on the parties, subject to the approval of the Secretary. The costs of such Arbitration Board shall be shared equally by the Lessee and the Lessor. It is further understood and agreed that the Secretary may be expected to accept any reasonable

decisions reached by said Arbitration Board, but he cannot be legally bound by any decision which might be in conflict with the interests of the Indians or the United States Government.

APPENDIX A-3

34. TERMINATION OF FEDERAL TRUST

Nothing contained in this lease shall operate to delay or prevent a termination of Federal trust responsibilities with respect to the land during the term of this lease; however, such termination shall not serve to abrogate this lease. In the event of such termination, all powers, duties, or other functions of the Secretary of the Interior or his authorized representative shall terminate, and the responsibility for enforcing compliance with the covenants of this lease shall be assumed by the Lessor, Lessor's heirs, devisees, executors, administrators or assigns.

Should the Secretary of the Interior, or his authorized representative, at any time during the life of this instrument, relinquish supervision because of termination statute, the removal

of the trust or restricted status from all or part of the acreage covered hereby, or for other causes, such relinquishment shall not bind the Lessee until said Lessee shall have been given thirty (30) day notice thereof by the Secretary. The notice shall state the extent of relinquishment or supervision and contain the name and address of the Lessor, or Lessor's successors in interest, as of the date of such notice, and any future payments due under this contract shall be payable thereto.

CERTIFICATE OF SERVICE

Robert B. Hoffman, being a member of the bar of this Court, hereby certifies:

1. That he is an active member of the bar of this Court and that he is an attorney for appellant herein.

2. That on this 30th day of September, 1983, the Brief in Opposition to Petition for Writ of Certiorari has been served upon counsel of record and the Solicitor General of the United States in accordance with the provisions of Rules 28.3 and 28.4(a) of the Rules of this Court by placing three copies of the same in the United States mail, first class postage prepaid to each of the foregoing at the following address:

Philip E. Toci
Toci, Murphy & Beck
Post Office Box 591
Prescott, Arizona 86302

Solicitor General
United States Department of Justice
Washington, D. C. 20530

3. That the foregoing represents service on all parties required to be served under the provisions of Rule 28, Rules of the United States Supreme Court.

Robert B. Hoffman

Robert B. Hoffman